(2)

No. 88-180

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY L. BOWLES, APPELLANT

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEES' MOTION TO DISMISS

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
BETH S. GINSBERG
JACQUES B. GELIN
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether denial of a jury trial on appellant's *Bivens* claims is reversible error where appellant presented insufficient evidence in support of those claims to have survived a motion for a directed verdict.

2. Whether the refusal by the Army Corps of Engineers to grant appellant a permit to fill his wetland lot was arbitrary, capricious, or an abuse of discretion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Branti v. *Finkel*, 445 U.S. 507 (1980)	6
Carlson v. *Green*, 446 U.S. 14 (1980)	2
Howard v. *Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987)	5
King v. *University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), cert. denied, 475 U.S. 1095 (1986)	5
Laskaris v. *Thornburgh*, 733 F.2d 260 (3d Cir.), cert. denied, 469 U.S. 886 (1984)	5
Molthan v. *Temple University*, 778 F.2d 955 (3d Cir. 1985)	5
N-500L Cases, In re, 691 F.2d 15 (1st Cir. 1982)	5
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	2

Constitution, statutes and regulations:

U.S. Const.:	
Amend. I	3, 4, 6
Amend. V	3
28 U.S.C. 1346(a)(2)	4
33 U.S.C. 1344	2
33 C.F.R. 323.2(c) (1978)	2
33 C.F.R. 323.2(a)(7)(c) (1986)	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-180

HARRY L. BOWLES, APPELLANT

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEES' MOTION TO DISMISS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A 1-26) is reported at 841 F.2d 112. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1988. The jurisdictional statement was filed on June 24, 1988. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).[1]

[1] Appellant's reliance upon Section 1254(2) is plainly misplaced. The court of appeals did not invalidate any state statute "as repugnant to the Constitution, treaties or laws of the United States." Nor does this case otherwise fall within the Court's appellate jurisdiction. Accordingly, the proper course, under 28 U.S.C. 2103, is to dismiss the appeal and treat appellant's papers as a petition for a writ of certiorari under 28 U.S.C. 1254(1). See, *e.g.*, *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988). For the reasons given below, that petition should be denied.

STATEMENT

1. Appellant owns a platted, unimproved 50-by-100-foot lot (Lot 29) on Follett's Island, Texas, fronting on Cold Pass, a body of salt water adjacent to the Gulf of Mexico (J.S. App. A 6-7). The property is subject to significant tidal action and is under water more than half the time. Appellant wants to place fill on the lot and construct a residence there. The Army Corps of Engineers, however, has determined that appellant's lot is "a valuable wetlands area that provides nutrients and detritus which are necessary for the support of fish and crustaceans" (J.S. App. A 13). Appellant accordingly must obtain a permit from the Corps in order to fill or alter Lot 29. See 33 U.S.C. 1344.[2]

Appellant applied to the Corps for a permit in May 1980. Shortly thereafter, appellant withdrew his application and began to fill Lot 29 with sand. In December 1980, the Corps ordered appellant by letter to halt all fill activity (J.S. App. A 8). In April 1981, appellant commenced this action in the United States District Court for the Southern District of Texas.

2. Appellant's complaint named as defendants the Galveston District Office of the Corps of Engineers and,

---

[2] Under 33 U.S.C. 1344, the Corps administers a permit program for the discharge of dredged or fill materials into "waters of the United States." Since 1975, Corps regulations have included "wetlands" within the meaning of "waters of the United States" and, consequently, within the coverage of the Corps' permit jurisdiction. Since 1977, Corps regulations have defined such "wetlands" as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support" vegetation "typically adapted" to saturated soil conditions; they include "swamps, marshes, bogs, and similar areas." 33 C.F.R. 323.2(c) (1978), as restated, 33 C.F.R. 323.2(a)(7)(c) (1986). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-124, 129-131, 134-135 (1985).

in both their individual and official capacities, the Corps' District Engineer and his two subordinates (J.S. App. A 8-9).[3] The complaint sought an injunction to stop the Corps' efforts to prevent appellant from filling and commencing construction on Lot 29; a declaratory judgment stating that the Corps' actions violated appellant's First and Fifth Amendment rights; and compensatory damages of one million dollars plus attorneys' fees and costs. Appellant's claim for damages was based both on a "takings" claim against the government and on *Bivens* claims against the individual defendants for alleged violations of appellant's First Amendment rights.

After the parties conducted pretrial discovery and the Corps moved for dismissal and for summary judgment, the district court abated appellant's action to enable him to apply once again for a permit. In October 1984, the Corps denied appellant's application for a dredge-and-fill permit for Lot 29, concluding that filling this wetland as proposed was not in the public interest. The Corps solicited alternative proposals from appellant, such as building a house on pillars or negotiating a mitigation plan, but he "consistently refused to cooperate with the Corps, steadfastly maintaining his right to build a slab house," and refusing "to investigate [other] * * * environmentally acceptable, economically feasible options" (J.S. App. A 22 n.25).

Upon resumption of appellant's civil suit, the district court found following a bench trial that Lot 29 was a wetlands area within the Corps' permit jurisdiction and that the Corps' denial of a permit was neither arbitrary nor capricious. The court further found that appellant's lot had not been "taken" as a result of the Corps' regulatory

---

[3] The appellees sued in their individual capacities are Colonel James Sigler, former District Engineer, Marcos De La Rosa and Fred Miller.

actions and that appellant had not presented any evidence to show that (J.S. App. A 20):

> (i) he engaged in any constitutionally protected speech, (ii) the Corps denied the permit application in retaliation for this unidentified speech, or (iii) the unidentified speech was a motivating factor in the Corps' decision.

The court accordingly denied all of appellant's claims.

3. On appeal, the court of appeals remanded appellant's just compensation claim for transfer to the Claims Court.[4] In all other respects it affirmed. The court of appeals concluded that the district court's factual findings—that Lot 29 was a wetlands area; that denial of a permit to fill and alter that lot was not arbitrary or capricious; and that the denial in no way related to, or constituted a denial of, appellant's constitutional rights under the First Amendment—were not clearly erroneous.

The court of appeals agreed with appellant that he was entitled to a jury trial on his *Bivens* claims. But the court concluded that the district court's "technically * * * erroneous" decision not to grant appellant a jury trial was harmless error "since there was no evidentiary basis for the constitutional claims" (J.S. App. A 23). "Although [appellant] claimed that the Corps denied his permit application in retaliation for unspecified speech activities," the

---

[4] Under 28 U.S.C. 1346(a)(2), district courts are without jurisdiction to adjudicate just compensation claims exceeding $10,000. In the court of appeals, the parties conceded that appellant's claim exceeded that amount and, thus, could be heard only by the Claims Court (J.S. App. A 21-22). After remand, the district court ordered the case transferred to the Claims Court. On May 20, 1988, the transferred case was docketed in the Claims Court as *Bowles* v. *United States*, No. 303-88L, and appellant filed an amended complaint therein on June 1, 1988.

court noted (*id.* at 24), "the evidence [appellant] presented on impermissible motive was insufficient to survive a directed verdict motion." "Under these circumstances," the court concluded (*id.* at 25-26), "a jury would never have had the opportunity to take the case under consideration. The absence of a jury physically present in the courtroom, if error at all, was harmless error."

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Appellant contends (J.S. 8-12) that the denial of a jury trial on his *Bivens* claims was reversible error. This Court has stated that a *Bivens* claimant may "opt for" trial by jury. *Carlson* v. *Green*, 446 U.S. 14, 22 (1980). The court of appeals, however, properly held that any error in denying appellant a jury trial was harmless because appellant's proof was so deficient that it would not have survived a motion for directed verdict. Appellant does not dispute the general principle that denial of a jury trial is harmless error where the moving party presents insufficient evidence to submit his case to a jury. In any event, this principle is plainly correct and has been accepted by a number of other circuits. See, *e.g.*, *Howard* v. *Parisian, Inc.*, 807 F.2d 1560, 1566 (11th Cir. 1987); *Molthan* v. *Temple University*, 778 F.2d 955, 961 (3d Cir. 1985); *King* v. *University of Minnesota*, 774 F.2d 224, 229 (8th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); *Laskaris* v. *Thornburgh*, 773 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984); *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982).

Instead, appellant asserts without explanation that "there was evidence sufficient to overcome any directed verdict motion" (J.S. 12). Appellant, however, fails even

to explain the precise nature of the First Amendment violations that he has alleged, much less to cite any evidence in support of those allegations.[5] In any event, such a factbound contention does not warrant review by this Court.

2. Appellant also contends (J.S. 12-19) that the Corps abused its discretion in denying appellant's permit application. Such a factbound question does not warrant review by this Court, particularly after it has been rejected by both lower courts. See *Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980). In any event, appellant fails to point out any defect either in the administrative record compiled by the Corps or in the Corps' determination based on that record. He also wholly fails to substantiate his bald assertion that the Corps departed from past practice so as to single out his lot for discriminatory treatment.

---

[5] Appellant does claim (J.S. 11) that, had he been granted a jury, "certain additional evidence to the jury would have been presented." But appellant does not elaborate on the nature of that evidence or provide an adequate excuse for his failure to present it at trial. According to appellant (*ibid.*), the district court "continually harranged [*sic*]" him "to finish his presentation" and, therefore, "the evidence was not presented." Appellant does not, however, cite any record support to show that he was prevented from presenting any relevant evidence.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Treating the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
BETH S. GINSBERG
JACQUES B. GELIN
DIRK D. SNEL
Attorneys

SEPTEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60639